IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

U.S. COMMODITY FUTURES TRADING COMMISSION	:	
v.	:	Civil Action No. DKC 2004-1021
CALVARY CURRENCIES LLC, et al.	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this commodities regulation case are (1) the motion of Defendants Calvary Currencies, LLC ("Calvary") and Arthur John Keeffe II ("Keeffe") for leave to file a surreply (paper no. 41), and (2) the motion of Plaintiff the United States Commodity Futures Trading Commission ("CFTC") to strike, pursuant to Fed.R.Civ.P. 14(a), the third-party complaint filed by Defendants on November 19, 2004 (paper no. 30). The issues are fully briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, the court denies Defendants' motion and grants Plaintiff's motion.

I. Background

On March 29, 2004, Plaintiff filed an action in this court alleging that Keeffe, himself and on behalf of his limited liability company, Calvary, fraudulently solicited customers, inducing them into illegal off-exchange trading of foreign currency futures in violation of Sections 4(a) and 4(b)(a)(i) and (iii) of the Commodity Exchange Act, 7 U.S.C. §§ 6(a), 6(b)(a)(i), (iii) ("The Act") and related CFTC Regulations, 17 C.F.R. § 1.1(b)(1), (3). *See* paper no. 1, at ¶ 1-2. Plaintiff requested injunctive relief, restitution, civil monetary penalties, and other equitable relief such as this court might find appropriate. *See id.* at ¶ 3.

Keeffe, and later Calvary, moved to dismiss for failure to state a claim, asserting that the transactions forming the basis of Plaintiff's complaint were not transactions for futures but "spot" transactions, over which the CFTC has no regulatory authority. *See* paper nos. 8 (Keeffe) and 17 (Calvary). On October 15, 2004, this court denied Defendants' motion to dismiss, concluding that, viewing the asserted facts in the light most favorable to Plaintiff as required when evaluating a motion to dismiss, the transactions were futures trades, not spot transactions. *See* paper nos. 23 (memorandum opinion) and 24 (order).

On November 19, 2004, Defendants filed a third party complaint against Gain Capital Group, Inc. ("Gain") and IFX, Ltd. ("IFX"), with whom Defendants had trading accounts. Paper no. 27. In it, Defendants assert breach of contract, negligent misrepresentation, breach of fiduciary duty, and negligence.

Id. Defendants continue to deny that they engaged in futures trading, but assert that, if the transactions are ultimately found to be futures trades and not spot transactions, Gain and IFX are liable to Defendants because Calvary's contracts with them indicated that all trades were to be spot transactions and because Calvary relied on their representations that they would engage only in spot transactions. *See id.*

Plaintiff moves to strike the third party complaint, arguing that Gain and IFX are improperly impleaded because Defendants' claims against Gain and IFX are separate from and independent of Plaintiff's claims against Defendants, which, Plaintiff contends, are based solely on Defendants' contractual relationships with Calvary's clients. Paper no. 30.

After Plaintiff replied to Defendants' response to the motion to strike, Defendants filed a "Reply to Plaintiff's Reply." Paper no. 40. Later realizing that surreplies are not permitted without the court's permission, Defendants *ex post* moved for leave to file their surreply.

II. Defendants' Motion for Leave to File Surreply

Surreplies are allowed only with leave of the court, Local Rule 105.2.a, and "may be permitted when the moving party would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Abrishamian v.*

Daley, 2004 U.S. Dist. LEXIS 23418, at *5 (D.Md. Mar. 26, 2004) (quoting *Khoury v. Meserve,* 268 F.Supp.2d 600, 605 (D.Md. 2003)), *aff'd,* 112 Fed.Appx. 923 (4th Cir. 2004). Defendants' motion does not specify any such matters, but instead seeks only to "respond[] to several allegations recited as facts by the Plaintiff, and simplif[y] the Defendants' position." The motion is therefore denied.

III. Plaintiff's Motion to Strike the Third Party Complaint

A. Standard of Review

The district court has discretion to dismiss or retain a third party claim filed under Rule 14(a). *See Duke v. Reconstr. Fin. Corp.,* 209 F.2d 204, 208 (4th Cir. 1954) (citing *Maryland ex rel. Wood v. Robinson,* D.C., 74 F.Supp. 279, 282 (D.Md. 1947)). As recently noted in *Dishong v. Tidewater Orthopaedic Assoc., Inc.,* 219 F.R.D. 382, 385 (E.D.Va. 2003):

> The purpose of Rule 14 is to permit additional parties whose rights may be affected by the decision in the original action to be joined and brought in so as to expedite the final determination of the rights and liabilities of all the interested parties in one suit. *Glens Falls Indem. Co. v. Atl. Bldg. Corp.,* 199 F.2d 60, 63 (4th Cir. 1952). . . . If bringing in the third party will introduce unrelated issues and unduly complicate the original suit, impleader may be denied. *[United States v. Dobrowolski,* 16 F.R.D. 134, 136 (D.Md. 1954)]. Moreover, a lack of similarity between the issues and evidence required to prove the main and third-party claims may be sufficient to warrant the dismissal of an impleaded party. Wright & Miller § 1443, at 310; United States Fid. & Guar. Co. v.

> Perkins, 388 F.2d 771, 773 (10th Cir. 1968) ("If impleading a third party defendant would require the trial of issues not involved in the controversy between the original parties without serving any convenience, there is no good reason to permit the third-party complaint to be filed.").

Furthermore, the Advisory Committee Notes to Rule 14 state that "the court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff's claim." Fed.R.Civ.P. 14, advisory committee note, 1963 Amendment. Case law also recognizes that a motion to strike should be granted where the claim is "obviously unmeritorious." *Hartford Fire Ins. Co. v. County Asphalt, Inc.,* 2002 U.S. Dist. LEXIS 22572, 2002 WL 31654853, at *6-7 (S.D.N.Y. Nov. 22, 2002) (citing *Aiello v. Midwest Operating Eng'rs Health & Welfare Fund,* 1992 U.S. Dist. LEXIS 7353, 1992 WL 122933, at *1 (N.D.Ill. May 28, 1992) and *Perez Cruz v. Fernandez Martinez,* 551 F.Supp. 794, 798-99 (D.P.R. 1982)); *see also* Wright & Miller § 1443, at 310 ("A lack of substance to the third-party claim may also be sufficient to warrant dismissal of an impleaded party.").

B. Analysis

Plaintiff contends in its complaint that Defendants violated section 4(a) of the Act[1] "by engaging in the offer and sale of illegal futures contracts," and section 4b(a)(2)(i) and (iii)[2]

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[1] Section 4(a) of the Act, 7 U.S.C. § 6(a), states, in pertinent part:

> [I]t shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business . . . for the purpose of soliciting or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery . . . unless--
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> (1) such transaction is conducted on or subject to the rules of a board of trade which has been designated or registered by the Commission as a contract market or derivatives transaction execution facility for such commodity . . . .

[2] Section 4b(a)(2) of the Act, 7 U.S.C. § 6b(a)(2), states, in pertinent part:

> It shall be unlawful . . . (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (A) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (B) determining the price basis of any transaction in interstate commerce in such commodity, or (C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof--
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> (i) to cheat or defraud or attempt to cheat or defraud such other person; [or]
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> (iii) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person.

and accompanying regulations “by engaging in fraudulent activity in connection with trading commodity futures contracts including making false representations.” Paper no. 1, at 2. If the court finds that Defendants engaged in futures trading, Defendants will be liable to Plaintiff under section 4(a), whether the contracts with Gain and IFX purported to authorize futures contracts, spot transactions, or, as Plaintiff colorfully suggests (paper no. 30, at 7), Krispy Creme stock. In fact, whether Defendants understood that they were engaged in futures trading is immaterial to the section 4(a) claim: The statute does not require that the Defendants knew or believed themselves to have traded in futures contracts, and in the absence of any such exception to the general rule, misunderstanding the statute is no defense. *See Bryan v. United States,* 524 U.S. 184, 199 (1998) (absent statutory exception, the general rule is that “ignorance of the law is no excuse”) (quoting *United States v. Int’l Minerals & Chem. Corp.,* 402 U.S. 558, 563 (1971)). The issues that will arise pursuant to that claim are therefore wholly separate from those that would arise in any complaint by Defendants against Gain and IFX; the third party complaint would merely “introduce unrelated issues and unduly complicate” the claim. *Dishong,* 219 F.R.D. at 385.

The third party complaint is likewise unrelated to the section 4b(a)(2) claim. To establish liability under section 4b(a)(2) requires a showing of "fraudulent activity in connection with trading commodity futures contracts." To justify their third party complaint, Defendants contend that, to the extent they engaged in futures trading and not spot transactions, they did so not fraudulently, but unwittingly and in reliance upon representations made by Gain and IFX. Paper no. 27. Plaintiff, however, does not claim merely that Defendants defrauded their clients into thinking that they were engaging in spot transactions when in reality they were trading in futures contracts, but rather that Defendants, while soliciting money that was invested in foreign currency futures contracts, defrauded their clients with misrepresentations about the likelihood of profit, risks, and Calvary's trading history. *See* paper no. 1, at 1; paper no. 30, at 3. That Defendants thought, or even represented to their clients, that they were soliciting for investments in the spot market, is, again, immaterial; to succeed on its section 4b(a)(2) claim, Plaintiff needs only show that (1) Defendants' activities were connected to the sale of futures contracts, and (2) Defendants' practices were fraudulent or deceptive. 7 U.S.C. § 6b(a)(2). Whether

Defendants were defrauded or otherwise misled by Gain and IFX is therefore unrelated to the resolution of Plaintiff's complaint.

Moreover, with respect to the section 4b(a)(2) claim, Defendants' demand for third-party indemnification is "obviously unmeritorious." Fed.R.Civ.P. 14, advisory committee note, 1963 Amendment. Gain and IFX cannot be liable to indemnify Defendants for alleged frauds against Defendants' clients under any theory presented in the third party complaint, as Defendants do not allege that Gain and IFX had any contact with, or in any way participated in defrauding, Defendants' clients. Defendants cannot hold Gain and IFX liable for what may turn out to have been, in the kindest light, a misinterpretation of the law distinguishing the futures and spot markets. If Gain and IFX engaged in illegal futures trading, it is within CFTC's province to choose to prosecute them as well, but their having engaged in such transactions would neither exonerate Defendants nor provide a basis for indemnification of Defendants' liability in the case at bar.

Because the third party complaint would "introduce unrelated issues and unduly complicate" both claims, *Dishong,* 219 F.R.D. at 385, and because Defendants' claim for contribution against Gain and IFX is "obviously unmeritorious," Fed.R.Civ.P. 14, advisory committee note, 1963 Amendment, the court will exercise its discretion to strike the third party complaint. A separate Order will follow.

/s/

DEBORAH K. CHASANOW
United States District Judge

February 2, 2005